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IN THE

Supreme Court of the United States

1971 TERM

No. .....

EDGAR EUGENE HARNESS, JR.,
Petitioner,

—v.—

COMMONWEALTH OF KENTUCKY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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INDEX

	PAGE
Citation to Opinion Below	1
Jurisdiction	1
Question Presented	2
Statement of the Case	2
(a) Nature of the Case and Course of the Proceedings	2
(b) Statement of the Facts	3
Reasons for Granting the Writ	5
The Court should grant certiorari to determine the substantial federal question, whether the Fourteenth Amendment denies State Police Officers the right to use entrapped evidence or information obtained during the course of a scheme of entrapment in an affidavit to support the issuance of a search warrant.	5
Conclusion	12
Appendix	13
Judgment of the Rowan Circuit Court	13
Opinion of the Court of Appeals of Kentucky as modified on Denial of Rehearing	15
Mandate of the Court of Appeals of Kentucky (Judgment)	25
Excerpts From Transcript of Evidence at Petitioner's Trial, Rowan Circuit Court, May 26, 1970	26

PAGE

Authorities Cited

Cases:

Aguilar v. Texas, 378 U.S. 108 (1964) 6, 7

Berkshire v. Commonwealth, (Ky.) 471 S.W. 2d 695 (1971) 7

Clay v. United States, 246 F. 2d 298 (5th Cir.), *cert. denied* 355 U.S. 863 (1957) 6

Griffey v. State, (Tex.) 327 S.W.2d 585 (1959) 10, 11

Kenney v. United States, 157 F. 2d 442, (App. D.C. 1946) 10

King v. United States, 282 F. 2d 398, (4th Cir. 1960) 10

Mapp v. Ohio, 367 U.S. 643 (1961) 9

Mooney v. Holohan, 294 U.S. 103 (1935) 6

Napue v. Illinois, 360 U.S. 264 (1959) 6

Nardone v. United States, 308 U.S. 338 (1938) 9

O'Bean v. State, (Miss.) 184 So. 2d 635 (1966) 10

Owens v. State, (Tenn.) 399 S.W. 2d 507 (1965) 10

People v. Alfinito, 211 N.E. 2d 644 (1965) 10, 11

People v. Bak, (Ill.) 258 N.E. 2d 341, *cert. denied,* 400 U.S. 882 (1970) 9

People v. Mitchell, (Ill.) 258 N.E. 2d 345, *cert. denied,* 400 U.S. 882 (1970) 9

Rugendorf v. United States, 376 U.S. 528 (1964) 6

Scott v. Commonwealth, (Ky.) 197 S.W. 2d 774 (1946) 5

Seager v. State, (Ind.) 164 N.E. 274 (1928) 10

Sherman v. United States, 356 U.S. 369 (1958) 8

PAGE

Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1919) 9
Smith v. State, (Md.) 62 A. 2d 287 (1948) 10
Sorrells v. United States, 287 U.S. 435 (1932) 8
Southard v. State, (Okla.) 297 P. 2d 585 (1956) 10
Spinelli v. United States, 393 U.S. 410 (1969) 6, 7
State v. Stevens, (Mo.) 292 S.W. 36 (1927) 10
State v. English, (Mont.) 229 P. 727 (1924) 10
Street v. New York, 394 U.S. 576 (1969) 5

Thacker v. Commonwealth, (Ky.) 17 S.W. 2d 399 (1929) 8, 10
Thompson v. Commonwealth, (Ky.) 472 S.W. 2d 884 (1971) 7

United States v. Brunett, 53 F. 2d 219, (W. D. Mo. 1931) 10
United States v. Ramos, 380 F. 2d 717, (2nd Cir. 1967) 10
United States v. Roth, 391 F. 2d 507, (7th Cir. 1968) 10
United States v. Ventresca, 380 U.S. 102 (1965) 6, 7

Weeks v. United States, 232 U.S. 383 (1913) 9
Wong Sun v. United States, 371 U.S. 471 (1963) 9

Statutes:

Cal. Pen. Code §§ 1539, 1540 (West 1970) 10
28 U.S.C. 1257 (3) 1

Miscellaneous Authorities:

84 Harv. L. Rev. 825 (1971) 5
67 Colum. L. Rev. 1529 (1967) 5
19 U.C.L.A. L. Rev. 96 (1971) 5

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COMMONWEALTH OF KENTUCKY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner, Edgar Eugene Harness, Jr., prays that a writ of certiorari issue to review the judgment herein of the Court of Appeals of Kentucky entered in the above styled case on February 18, 1972.

Citation to Opinion Below

The opinion of the Court of Appeals of Kentucky is reported at 475 S.W. 2d 485, and printed in the Appendix, *infra,* pp. 15-24. It affirmed the judgment of the Rowan Circuit Court, which is printed in the Appendix, *infra,* pp. 13-14.

Jurisdiction

The final judgment of the Court of Appeals of Kentucky was entered on February 18, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

Question Presented

Does the Fourteenth Amendment deny state police officers the right to use entrapped evidence or information obtained during the course of a scheme of entrapment in an affidavit to support the issuance of a search warrant?

STATEMENT OF THE CASE

(a) Nature of the Case and Course of Proceedings.

Edgar Eugene Harness, Jr., Petitioner, was charged with and indicted for (a) possession of dangerous drugs (two counts); and, (b) sale of dangerous drugs (two counts). Petitioner moved to suppress all the evidence and controvert the search warrant. Upon motion, the Court held an oral hearing on entrapment and concluded that there was entrapment and suppressed evidence as to marijuana involved but over Petitioner's objection allowed the search warrant to stand.

The trial began May 27, 1970, resulting in a verdict of guilty of possessing dangerous drugs. A judgment of conviction and commitment was entered, fixing his punishment at confinement in the penitentiary for five years and a fine of $5,000.00. Appendix, *infra*, pp. 13-14.

Petitioner appealed that judgment to the Court of Appeals of Kentucky and that court affirmed the judgment by original opinion on October 22, 1971, overruled Petitioner's petition for rehearing on February 18, 1972, and issued the mandate.

Petitioner applies for a writ of certiorari to the order overruling his petition for rehearing and the issuance of the mandate.

(b) Statement of Facts.

Trooper Herbert Bowling of the Kentucky State Police, in Rowan County, Kentucky, swore to the affidavit which supported the search warrant in this case, the pertinent parts of which are as follows:

(a) ". . . Dave Roberts alighted from the Affiant's automobile, knocked on the house trailer door, and "Sonny" Harness came to the door, talked with Dave Roberts, and admitted him to the trailer. In approximately two (2) minutes Dave Roberts and "Sonny" Harness reappeared at the door, Dave Roberts came back to the car and delivered two (2) pills or tablets of LSD to the Affiant, and told Affiant that he had purchased these pills from "Sonny" Harness for Five ($5.00) Dollars, which Affiant had previously given Roberts.

(b) "Further Affiant states that on 27th February, 1970, at 9:45 p.m. local time he went to the above described trailer and purchased ten (10) grams of hashish or marijuana from Edgar Eugene Harness for which Affiant paid the said Harness the sum of $32.50 U. S. currency." T.E., Vol. 3, p. 74; Defendant Exhibit No. 3; Appendix, *infra*, p. 29.

The Kentucky State Police in the evening of the day the Rowan County affidavit was made, searched the premises of the Petitioner and found, among other things, twenty-five LSD tablets, T. E., Vol. 3, p. 128. Petitioner was arrested and charged with both selling and possession of marijuana and LSD. T. E., Vol. 3, p. 129. That same night Trooper Bowling returned to Fayette County, Kentucky, and made an affidavit to support a search warrant for the premises occupied by Mr. and Mrs. Larry Berger. In that affidavit he swore that he purchased twenty grams of marijuana from

Larry Knight (actually Larry Berger). T. E., Vol. 3, pp. 49-50; Defendant Exhibit No. 2, Appendix, *infra*, p. 27. During the oral hearing, Bowling admitted that this was the same marijuana he had sworn he had purchased from Petitioner in Rowan County in the first affidavit mentioned herein. T. E., Vol. 3, p. 124; Appendix, *infra*, p. 31. He further admitted that the only reason he gave drugs to Petitioner was so he could purchase them back from him. T. E., Vol. 3, pp. 78, 79; Appendix, *infra*, p. 30.

Petitioner moved the Court to controvert the search warrant and suppress the evidence because the affidavit contained illegally obtained information. T. E., Vol. 3, p. 142. A hearing was held and the trial court ruled there was entrapment but that the search warrant was valid and ordered that the trial against Petitioner continue upon the charge of possession of LSD. T. E., Vol. 3, p. 131.

The LSD found pursuant to the search warrant in this case was introduced as evidence in the trial. Petitioner was convicted of possession of LSD and sentenced to five years in prison and a fine of $5,000.00. An appeal was taken to the Court of Appeals of Kentucky. The conviction was affirmed by upholding the search warrant and stating that the affidavit was regular in form and that it was not proper to attack the integrity of the allegations of the affidavit; therefore allowing entrapped evidence to serve as the basis of probable cause for issuance of the search warrant. Opinion of the Court of Appeals of Kentucky, pp. 4, 5, Appendix, *infra*, p. 18.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to determine the substantial federal question, whether the Fourteenth Amendment denies State Police Officers the right to use entrapped evidence or information obtained during the course of a scheme of entrapment in an affidavit to support the issuance of a search warrant.

This issue was necessarily presented to the trial court and the Kentucky Court of Appeals as required by *Street* v. *New York*, 394 S.W. 576 (1969). (See T. E., Vol. 3, p. 131 and Appendix, *infra*, p. 31). (See question and argument "A", Brief for Appellant, pp. i, 1, 11 and Petitioner's petition for rehearing, pp. i, 5, where the question was squarely presented to the Court). The Kentucky Court of Appeals decided this issue unfavorably to Petitioner. The Kentucky Court had previously avoided deciding this issue in *Scott* v. *Commonwealth*, (Ky.) 197 S.W. 2d 774 (1946), by reversing on other grounds, but did decide it in this case by upholding the search warrant based on that portion of the affidavit that had been held to be entrapped evidence by the trial court.

This petition presents to this Court a substantial federal issue that is being handled by the lower court system without any uniformity or guidance. 84 Harv. L. Rev. 825 (1971); 67 Colum. L. Rev. 1529 (1967); 19 U.C.L.A. L. Rev. 96 (1971). The broad and general form of the narrow issue presented here is whether or not the integrity of an affidavit supporting a search warrant may be attacked? This court has never actually decided that issue or any of the more narrow

legal questions contained therein. *Rugendorf* v. *United States*, 376 U.S. 528, 532 (1964).

False or perjured testimony during trial within the knowledge of the state and not corrected is denial of due process under the Fourteenth Amendment. *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Mooney* v. *Holohan*, 294 U.S. 103 (1935). Such matters are usually detected because they arise in an adversary proceeding. On the other hand, affidavits for search warrants are presented in *ex parte* proceeding where the sole judge of their integrity is often a magistrate not trained in law. *Clay* v. *United States*, 246 F. 2d 298 (5th Cir.), *cert. denied* 355 U.S. 863 (1957). To have such people deciding constitutional issues as important as a person's right to be free of unreasonable searches and not allow reasonable investigation into the integrity of the affidavit leaves the accused solely at the mercy of the sometimes unscrupulous affiant. In such cases the magistrate is not more than a rubber stamp for the dishonest affiant.

The affidavit to support the issuance of the search warrant in this case can be divided into two portions. The first portion relates to information received by the affiant from a named informant. Petitioner raised issues in the trial court and the Kentucky Court of Appeals with respect to this portion of the affidavit which have already been decided by this Court in *United States* v. *Ventresca*, 380 U.S. 102 (1965); *Spinelli* v. *United States*, 393 U.S. 410 (1969); *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *i. e.*, Where an informant is the source of information upon which the affidavit is based the affiant must allege facts showing the informant's reliability. The first portion of the affidavit in this case completely failed to meet these require-

ments. The Kentucky Court avoided these questions in Petitioner's case by stating that the above cited cases ". . . deal with the requirements of an affidavit . . . when information has been furnished by an unnamed informant . . . We do not consider it necessary to determine whether *Spinelli, Ventresca* and *Aguilar* are applicable to named informants, because we believe that the affidavit for the search warrant is sufficient without reference to the alleged purchase of the two (2) LSD tablets by Dave Roberts," (Opinion of the Court of Appeals of Kentucky, p. 4, Appendix, *infra,* p. 17. The Kentucky Court, pending the appeal, held that the requirement of reliability is applicable to named informants. *Thompson* v. *Commonwealth,* (Ky.) 472 S.W. 2d 884 (1971); *Berkshire* v. *Commonwealth,* (Ky.) 471 S.W. 2d 695 (1971). These cases were cited to the Kentucky Court in Petitioner's petition for rehearing. Petition for Rehearing, pp. 7, 8. Therefore, the search warrant would not have and could not have been upheld on the first portion of the affidavit.

The Kentucky Court of Appeals decided the issue involved in this petition by saying:

> "The affidavit in express language alleged that the officer Bowling on the 27th day of February, 1970, purchased ten grams of marijuana from appellant at his house trailer. Appellant concedes that this allegation was ample to support the issuance of the warrant but argues that the order of the trial court dismissing the indictments relating to the marijuana had the effect of removing that portion of the affidavit of officer Bowling relating to the marijuana. Appellant cites no authority for this proposition and we know no reason why it should be so.
>
> "The affidavit was regular in form and the statements contained therein sufficiently showed

probable cause. *It is not proper to go behind the allegations of the affidavit in determining whether the allegations furnish sufficient evidence of probable cause.* (Emphasis added) *Commonwealth* v. *Thacker*, 229 Ky. 488, 17 S.W. 2d 399 (1929).

"The twenty-five (25) tablets of LSD found in the search were properly admitted in evidence at the trial." Opinion of the Court of Appeals of Kentucky, pp. 4, 5, Appendix, *infra*, p. 18.

The facts of this case necessitated and the trial court did find that there was entrapment as a matter of law. All of the police methods condemned by this Court in *Sorrells* v. *United States*, 287 U.S. 435 (1932) and *Sherman* v. *United States*, 356 U.S. 369 (1958) are present here, and further evidence of the officer's unlawful conduct is the fact that he swore to at least one false affidavit to secure a search warrant. T. E., Vol. 3, pp. 49, 50; Def. Exh. 1, 2; Appendix, *infra*, pp. 26, 27. The trial court during the trial before the jury disallowed testimony with respect to the entrapment, dismissing the charges relating to the entrapped marijuana, but allowed the officer to use that information in an affidavit to support a search warrant.

If police are allowed to use the fruits of their illegal actions in affidavits to secure search warrants it will be repugnant to any concept of fairness and encourage the employment of such condemned practices. In this case the officer has realized the result he intended although the court has pronounced his means illegal. This general problem has been faced in a long line of decisions by this Court and the decision of the Court of Appeals of Kentucky is not in accord with applicable decisions of this Court. It should be pointed out that the Kentucky Court relied on a case decided in 1939 which was before this Court applied the exclu-

sionary rule to the states in *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

Illegally obtained evidence cannot be used for any purpose against a defendant. *Weeks* v. *United States,* 232 U.S. 383 (1913). Illegally obtained evidence cannot be used as evidence to secure other evidence. *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1919); *Nardone* v. *United States,* 308 U.S. 338 (1938); *Wong Sun* v. *United States,* 371 U.S. 471 (1963). To permit entrapped evidence to be used as a basis for the search warrant here violates the general rule of law in the cited cases. "The essence of a provision forbidding the acquisition of evidence in a certain way is not merely that evidence so acquired shall not be used before the Court, but that it shall not be used at all." *Silverthorne, supra,* p. 391. But for the illegally obtained information, there would have been no search at all. Not only was this illegally obtained information not usable at the trial, but its use in the affidavit was not proper.

In deciding this case the Court of Appeals of Kentucky decided a substantial federal constitutional question, that has not been decided by this court, and that decision is obviously in conflict with the holdings of the above cited cases.

At the present time both the federal and state courts are divided as to whether any attack may be made on the integrity of an affidavit in support of the issuance of a search warrant. There are many cases holding that Defendants have no right to question the integrity of affidavits. These holdings are dogmatic and without judicial reasoning. *People* v. *Bak,* (Ill.) 258 N.E. 2d 341, *cert. denied* 400 U.S. 882 (1970); *People* v. *Mitch-*

ell, (Ill.) 258 N.E. 2d 345, *cert. denied* 400 U.S. 882 (1970); *Seager* v. *State,* (Ind.) 164 N.E. 274 (1928); *Commonwealth* v. *Thacker,* (Ky.) 17 S.W. 2d 399 (1929); *Smith* v. *State,* (Md.) 62 A. 2d 287 (1948); *State* v. *Stevens,* (Mo.) 292 S.W. 36 (1927); *State* v. *English,* (Mont.) 229 P. 727 (1924); *Southard* v. *State,* (Okla.) 297 P. 2d 585 (1956); *Owens* v. *State,* (Tenn.) 399 S.W. 2d 507 (1965); *Griffey* v. *State,* (Tex.) 327 S.W. 2d 585 (1959); *Kenney* v. *United States,* 157 F. 2d 442 (App. D. C. 1946); *United States* v. *Brunett,* 53 F. 2d 219 (W.D. Mo. 1931).

On the other hand, cases allowing limited inquiry into the integrity of an affidavit have either relied on statutory authorization or have limited such inquiries to challenges on very narrow issues. *O'Bean* v. *State,* (Miss.) 184 So. 2d 635 (1966) (*dicta*); Cal. Pen. Code §§ 1539, 1540 (West 1970); *People* v. *Alfinito,* (N.Y.) 211 N.E. 2d 644 (1965); *United States* v. *Roth,* 391 F. 2d 507 (7th Cir. 1968); *United States* v. *Ramos,* 380 F. 2d 717 (2nd Cir. 1967) (Hearing on affidavit directed by District Court); *King* v. *United States,* 282 F. 2d 398 (4th Cir. 1960).

To allow an affidavit, which contains perjurious or illegally obtained information to support a search warrant is in conflict with the constitution and all concepts of justice and fairness. Obviously to allow such illegal conduct on the part of the police is violative of the constitutional rights of our citizens and will damage public confidence in our courts.

In this case the issue of entrapment was raised and hearing granted in the normal course of business of the court handling a criminal trial. The trial court was faced with the knowledge that a police officer had en-

trapped the defendant and had further used the information gained from that entrapment to secure the warrant. The trial judge had full knowledge of this illegal conduct by the police officer confronting him, yet had no remedy available because of the controlling precedent of Kentucky law. This happens often in reported cases and no doubt multitudinous times in unreported cases. It often comes to the attention of the trial court, through admissible testimony during trial or indirectly as it did in the instant case during a hearing on entrapment, that affidavit information was illegally obtained or false, but courts are forced to abide by precedents concluding that search warrant affidavits may not be impeached. States with precedents similar to the New York rule, *People* v. *Alfinito, supra,* allow impeachment of affidavits under the circumstances but those following the Texas rule would not allow impeachment even if admissible testimony at the trial proved the affidavit to be entirely false. *Griffey* v. *State, supra.*

The status of the rule that the affidavit cannot be attacked under any circumstances is similar to the law that once existed with respect to search warrants, *i.e.*, officers could not confiscate items in a search which were not authorized by the search warrant. The question then arose, should an officer ignore evidence of illegality or contraband once he sees it even though it is not expressly what he is looking for? The rule was properly changed to allow officers to confiscate evidence of illegality they observed in the normal course of a lawful search. How can trial courts continue to ignore illegality on the part of police officers when it becomes obvious during the normal course of the proceedings? Why is perjury or illegality more ac-

ceptable in affidavits, which are designed to protect a constitutional right, than during trials?

The sanctity given search warrant affidavits by the majority of our courts is unsupported by any sound judicial reasoning. When the courts deny the right to reasonably question affidavits made by police officers, who are pressured to make arrests and obtain convictions, and the right to question magistrates, who are many times unqualified to perform the duty we demand of them, constitutional protection becomes a sham. Denial of the right to reasonably question affidavits leaves our constitutional right to be free of unreasonable searches at the mercy of the law enforcement officer who may be dishonest.

Where during an exclusionary hearing or during the jury trial it becomes obvious to the trial judge that the affidavit and the search warrant are based upon perjury or illegally obtained or entrapped evidence the Fourteenth Amendment demands that the search warrant be quashed and the Defendant released if there is no other competent evidence to support the charges.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be granted to review the judgment of the Court of Appeals of Kentucky.

Respectfully submitted,

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May 1972

APPENDIX

Judgment of the Rowan Circuit Court

Thereafter, on the 29th day of May, 1970, the following Judgment of Conviction and Commitment was entered in the Commonwealth Order Book No. 17 at page 374, records of the Circuit Court Clerk's Office of Rowan County, Kentucky, said judgment being in words and figures, as follows, to-wit:

ROWAN CIRCUIT COURT

COMMONWEALTH OF KENTUCKY, *Plaintiff*

VS: *Judgment of Conviction and Commitment*

EDGAR EUGENE HARNESS, JR., *Defendant*

The defendant, Edgar Eugene Harness, Jr., having been indicted by the grand jury of Rowan County charged with the crime of illegal possession of dangerous drugs, to-wit: LSD, and having entered his plea of not guilty upon his arraignment he was tried before a jury which returned a verdict of guilty fixing his punishment at confinement in the penitentiary for five years and at a fine of $5000.00, he is therefore found guilty and his punishment is fixed in accordance with said jury verdict. The defendant appearing in open court this day was asked by the Judge if he had any legal cause to show why sentence should not be pronounced against him, and no such grounds being stated or shown it is ordered that the said defendant be taken by the Sheriff of Rowan County to the State Reform-

atory at LaGrange, Kentucky to be confined for a period of five years.

This May 29, 1970.

/s/ JOHN J. WINN
Judge

Opinion of the Court of Appeals of Kentucky

As Modified on Denial of Rehearing

RENDERED: October 22, 1971

COURT OF APPEALS OF KENTUCKY

EDGAR EUGENE HARNESS, JR. *Appellant*

v. *Appeal From the Rowan Circuit Court*
Honorable John J. Winn, Judge

COMMONWEALTH OF KENTUCKY *Appellee*

OPINION OF THE COURT BY COMMISSIONER VANCE

AFFIRMING

The appellant, Edgar Eugene Harness, Jr., was convicted of the offense of unlawful possession of dangerous drugs and his punishment was fixed by a jury at confinement in the penitentiary for a period of five years and a fine in the amount of $5,000.00. KRS 217.731 and KRS 217.995. He claims the judgment of conviction should be reversed because (1) the fruits of an illegal search were admitted in evidence against him, (2) the court erred in denying his petition for change of venue, (3) the court erred by failing to grant appellant's motion for a continuance and (4) there was improper conduct of the Commonwealth's Attorney.

On February 27, 1970, police officers conducted a search of a mobile home in which the appellant resided. Twenty-five (25) tablets of LSD and a quantity of marijuana, both dangerous drugs as defined in KRS 217.725, were found in a bathroom which adjoined the bedroom occupied by appellant. The appellant was charged in separate indictments with unlawful possession of both LSD and marijuana but the indictment

for unlawful possession of marijuana was dismissed on a plea of entrapment.

An affidavit made by a state police officer, Herbert Bowling, to secure a search warrant contained the following allegations:

> "Affiant further states that the information upon which he relies is as follows: That on 25th February 1970, at the hour of 12:25 A.M., local time, he drove to said above described housetrailer with Dave Roberts and Jerry Jones, after the said Dave Roberts informed affiant he could purchase LSD tablets or pills there, from a person identified as 'Sonny' Harness. Dave Roberts alighted from affiants automobile, knocked on the housetrailer door and 'Sonny' Harness came to the door, talked with Dave Roberts and admitted him to the trailer. In approximately two (2) minutes Dave Roberts and 'Sonny' Harness reappeared at the door, Dave Roberts came back to the car and delivered two (2) pills or tablets of LSD to this affiant and told affiant he had purchased these pills from 'Sonny' for Five ($5.00) Dollars, which affiant had previously given Roberts.
>
> "Further affiant states on the 27th February 1970, at 9:45 P.M., local time, he went to the above described trailer and purchased approximately ten (10) grams of hashish or marijuana from Edgar Eugene Harness for which affiant paid the said Harness the sum of $32.50, U. S. currency.
>
> "Affiant further states that dangerous drugs and narcotics are unlawfully possessed by the said Edgar Eugene Harness as he believes.
>
> "Affiant further states that the persons de-

scribed as 'Sonny' Harness and Edgar Eugene Harness are the one and same person.

" */s/ Herbert Bowling*
HERBERT BOWLNG"

The appellant attacks the search warrant upon the ground that it was issued without probable cause. His contention in this regard is that officer Bowling relied upon the information supplied by Dave Roberts, an informant, with respect to the purchase of two (2) LSD tablets; that nowhere in the affidavit does the officer assert that the said Dave Roberts was a reliable person and worthy of belief, or any facts to indicate the reliability of Mr. Roberts, or even an assertion that the officer believed Mr. Roberts to be reliable. Appellant relies upon Spinelli v. United States, 393 U.S. 410, 21 L Ed 2d 637 (1969); United States v. Ventresca, 380 U.S. 102, 13 L Ed 2d 684 (1965) and Aguilar v. Texas, 378 U.S. 108, 12 L Ed 2d 723 (1964). The cases cited deal with the requirements of an affidavit for a search warrant when information has been furnished by an unnamed informant. In this case the name of the alleged informant was divulged in the affidavit. We do not consider it necessary to determine whether *Spinelli, Ventresca* and *Aguilar* are applicable to named informants because we believe that the affidavit for the search warrant is sufficient without reference to the alleged purchase of the two (2) LSD tablets by Dave Roberts.

The affidavit in express language alleged that officer Bowling on the 27th day of February 1970 purchased ten grams of marijuana from appellant at his house trailer. Appellant concedes that this allegation was ample to support the issuance of the warrant but

argues that the order of the trial court dismissing the indictments relating to the marijuana had the effect of removing that portion of the affidavit of officer Bowling relating to the marijuana. Appellant cites no authority for this proposition and we know of no reason why it should be so.

The affidavit was regular in form and the statements contained therein sufficiently showed probable cause. It is not proper to go behind the allegations of the affidavit in determining whether the allegations furnish sufficient evidence of probable cause. Commonwealth v. Thacker, 229 Ky. 488, 17 S.W. 2d 399 (1929).

The twenty-five (25) tablets of LSD found in the search were properly admitted in evidence at the trial.

The appellant next contends that because of undue pretrial publicity public opinion was biased against the defendant and he could not obtain a fair trial in Rowan County, Kentucky. His motion for change of venue was overruled.

Appellant filed as exhibits in his behalf copies of newspapers which carried accounts of appellant's arrest, the fact that the case had been submitted to a grand jury and brief reports on the returning of the indictments. There was no apparent attempt to fan the flames of public resentment against the defendant, no repetitious keeping the matter before the public day after day and in no sense do we consider the pretrial publicity "a trial by a newspaper."

Other activities, such as the fact that two meetings were held at schools on the general subject of drug

abuse, fall far short of establishing that the public mind was poisoned against appellant.

Appellant's petition for change of venue was accompanied by the affidavits and testimony of seven witnesses.

The Commonwealth countered with the testimony of the county sheriff, the deputy county court clerk and the mayor of the city of Morehead. Each of the Commonwealth's witnesses was shown to have a wide acquaintance in the county and each expressed the opinion that appellant could receive a fair trial in Rowan County. The substance of the testimony of each of the witnesses was that there was no public sentiment, public prejudice or public interest in the case; that they had not heard anybody at all discussing the case since shortly after the indictment was returned and that nobody had expressed to them an opinion as to the guilt or innocence of the appellant.

Appellant takes the position that this evidence merely shows the witnesses were not acquainted with the state of public opinion. We do not so regard it. When witnesses who are actively engaged in dealing with a broad cross-section of the general public testify that they have not heard any public discussion about a particular criminal prosecution, one inference which can be drawn therefrom is that such prosecution does not occupy any prominent spot in the minds and thoughts of the people. If the whole community were outraged, prejudiced or crying out for the scalp of a defendant, it would be reasonable to expect witnesses of the type offered by the Commonwealth to have heard some inkling of it.

Although the witnesses for appellant claimed to have overheard specific instances of expression of appellant's guilt, for the most part they could not, or would not, identify any person who had so expressed himself and these witnesses did not pretend to have any general familiarity with the state of public opinion over the entire county. All of the witnesses for appellant were personal acquaintances, five of whom he had met during his student days at the university. The other two were attorneys. One of the attorneys is a member of the firm which represented the appellant and filed a brief for him with this court. The other had resided less than one year in Rowan County. In view of the evidence offered by the Commonwealth, the matter of change of venue addressed itself to the sound discretion of the trial court and we are not authorized to interfere with the exercise of that discretion unless it was clearly abused. Hurley v. Commonwealth, Ky., 451 S.W. 2d 838 (1970); Williams v. Commonwealth, 287 Ky. 570, 154 S.W. 2d 563, 136 A.L.R. 1398 (1941). In Carnes v. Commonwealth, 306 Ky. 55, 206 S.W. 2d 44 (1947) we said:

> "* * * The trial court is vested with a sound discretion in determining the question where there is evidence both in support and in resistance of the motion, and this court has uniformly held that it will not interfere with the trial court's decision unless it appears with reasonable certainty that there has been an abuse of discretion. * * *."

The above-quoted language was cited with approval in Nickell v. Commonwealth, Ky., 371 S.W. 2d 849 (1963) and we think it is particularly applicable in this case.

Finally it should be noted that no record of the voir

dire examination is before us. We do not know if any juror who tried this case had ever heard of it before the trial. In the absence of a showing that some one or more of the jurors were at least exposed to the alleged public prejudice and sentiment against the appellant, we cannot hold that appellant was prejudiced.

The appellant next contends that the trial court erred in refusing his motion for a continuance. He asked for the continuance because of the unavailability of the witnesses Jerry Jones and Dave Roberts at the trial and filed an affidavit as to what he expected each witness would testify. The testimony for the Commonwealth conceded every material fact that appellant expected to prove by the absent witnesses except for appellant's claim that the witness Dave Roberts would testify that he did not on any occasion procure any drugs from appellant and that he did not tell officer Bowling that he had ever purchased any drugs from appellant. That evidence would be material only insofar as it related to the attack upon the affidavit for the search warrant in which officer Bowling stated that Dave Roberts gave him two (2) LSD tablets which he stated were purchased from appellant. Since the validity of the affidavit was sustained upon the basis of other allegations in the affidavit, the testimony of the absent witnesses was immaterial.

Appellant alleges that a state chemist was erroneously permitted to testify as to the hallucinogenic properties of LSD and that the Commonwealth's Attorney made an improper argument in three instances as follows:

> (1) "LSD is not just a common pill. It's not like 25 pills of St. Joseph's aspirin that you and I would have in our medicine cabinet."

(2) "* * * by dangerous, it is dangerous to human life: Witness the death of Art Linkletter's daughter."

(3) "In cases like this for the possession of dangerous drugs, such as LSD, in my opinion the punishment is not commensurate with the offense."

We think it was proper to show that LSD has hallucinogenic properties and appellant cites to us no authority that a state chemist was not qualified to so testify.

We do not think that the argument of the Commonwealth's Attorney requires a reversal of the conviction. A Commonwealth's Attorney may legitimately argue that a crime is a serious one and should carry a heavy penalty. The only aspect of the argument requiring comment is the reference to the death of Art Linkletter's daughter. The argument is the assertion of a fact not shown by the record and yet it was an event of very widespread general knowledge.

Appellant relies upon the cases of Carnes v. Commonwealth, Ky., 406 S.W. 2d 849 (1966) and Harrison v. Commonwealth, Ky., 368 S.W. 2d 171 (1963). Those cases are distinguishable upon the facts but in each of them we did condemn a concluding argument in which the Commonwealth's Attorney stated facts not in evidence. In *Carnes* the Commonwealth's Attorney argued:

" 'I have been your Commonwealth's Attorney four years and I truthfully say, ladies and gentlemen, that ninety per cent of our crime is a direct result of alcoholic beverage, * * *.' "

In *Harrison* the argument was:

"'* * * Most of the murder cases that are tried are caused by liquor. * * *.'"

In *Carnes* and *Harrison,* the Commonwealth's Attorney undertook to testify in his concluding argument that a certain percentage of crime (or most of it) resulted from the use of intoxicating liquors. This was not a fact of record, nor could it reasonably be said to be a matter of which jurors would have common knowledge or of which they could take notice without proof.

A Commonwealth's Attorney may not so inflame the jurors with heinous details or consequences of a crime that they, solely out of passion and prejudice, will be led to return a verdict of guilty. On the other hand he is allowed reasonable latitude in argument to persuade the jurors the matter should not be dealt with lightly.

In this regard it is difficult to draw a fixed line between the permissible and impermissible and to some extent each case must be reviewed in the light of the particular facts pertaining to that case.

We regard the reference to the death of Art Linkletter's daughter in the argument as the equivalent of having argued that LSD is a dangerous substance which can cause death. There was proof in the record of hallucinogenic properties of LSD. We feel that it would have been proper argument to state to the jury that LSD was a dangerous substance; that persons having taken it are subject to hallucinations and that while in such a condition they might easily injure or kill themselves or others.

The fact that Art Linkletter's daughter had jumped

to her death (supposedly under the influence of drugs) was well-known. If the mention of her death in connection with the dangers attributable to LSD exceeded the bounds of propriety, it did not stray far beyond the pale. The reference to her death may have dramatized the dangerous propensities of LSD and we think better practice would have avoided such an argument. Nevertheless, we do not believe that when all of the facts of this case are considered, it can be said that there is any likelihood that the reference to the death of Art Linkletter's daughter so inflamed the jury as to influence their verdict.

The judgment is affirmed.

All concur.

Mandate of the Court of Appeals of Kentucky (Judgment)

Fall Term — October 22, 1971

THE COMMONWEALTH OF KENTUCKY,
THE COURT OF APPEALS

EDGAR EUGENE HARNESS, JR.

VS

COMMONWEALTH OF KENTUCKY

Appeal from a judgment of the Rowan Circuit Court

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A copy—Attest:

FRANCES JONES MILLS, C.C.A.
By /s/ JOHN C. SCOTT, D.C.

Issued February 18, 1972

PETITION FOR REHEARING OVERRULED

Excerpts From Transcript of Proceedings at Petitioners Trial, Rowan Circuit Court, May 26, 1970

[T. E., Vol. 3, pp. 30, 133]
DEFENDANT'S EXHIBIT No. 1

ROWAN QUARTERLY COURT

COMMONWEALTH OF KENTUCKY — *Plaintiff*

Complaint and Information

EDGAR EUGENE HARNESS alias "Sonny" Harness — *Defendant*

COMMONWEALTH OF KENTUCKY
COUNTY OF ROWAN

Affiant and Complainant, Herbert Bowling, charges that Edgar Eugene Harness, defendant, did on the 27 day of February, 1970, in Rowan County, Kentucky, unlawfully sell narcotic drugs or dangerous drugs, to-wit; Edgar Eugene Harness sold and delivered to this affiant approximately 20 grams of marijana (hashish) for which affiant paid said Edgar Eugene Harness the sum of $32.50, U. S. currency contrary to the statutes in such cases made and provided, and against the peace and dignity of the Commonwealth of Kentucky.

/s/ HERBERT BOWLING

Sworn to before me this 27 day of February, 1970.

/s/ OTTIS CALDWELL
Judge, Rowan County Court

[T. E., Vol. 3, pp. 49, 134]
DEFENDANT'S EXHIBIT No. 2

Affiant has been an officer in the above agency for a period of 2 years and the information and observations contained herein were received and made in his capacity as an officer thereof.

On the 27th day of February, 1970, at approximately 1:00 a.m., affiant observed A Larry Knight using Marijuana, and Cocaine in apartment number 3 at 251½ Stone Av. and Larry Knight gave Officer Herbert Bowling Marijuana to smoke and Officer Herbert Bowling did smoke the marijuana, and Larry Knight offered Officer Herbert Bowling some Cocaine but the Officer Herbert Bowling refused the use of the Cocaine. Larry Knight also offered to sell Officer Herbert Bowling some L.S.D. later in the day if Officer Herbert Bowling would return to apartment number 3 at 251½ Stone Av.

Acting on the information received, affiant conducted the following independent investigation: Officer Herbert Bowling returned to 251 Stone Av., apartment number 3 and Larry Knight offered to sell Officer Herbert Bowling some Marijuana and did sell him 20 grams of marijuana for $60.00, after taking him some six blocks from 251½ Stone Av. to and unknown house to complete the sale of the Marijuana for $60.00.

Affiant has reasonable and probable cause to believe

that grounds exist for the issuance of a search warrant, based on the aforementioned facts, information and circumstances and prays that a search warrant be issued, that the property be seized, or any part thereof, and brought before any court and/or retained subject to order of said court.

/s/ HERBERT BOWLING

Subscribed and sworn to before me on
this 28 day of February, 1970 at 4:00 a.m.

/s/ JAMES G. AMATO
Judge, Lexington Police Court

[T. E., Vol. 3, pp. 73, 135]
DEFENDANT'S EXHIBIT No. 3

AFFIDAVIT

STATE OF KENTUCKY)
County of Rowan) Sct.

The affiant, Herbert Bowling, Kentucky State Police, after being duly sworn, says that he has reasonable grounds to believe, and does believe, that Edgar Eugene Harness has in his possession, or on or about his premises at Clearfield, Rowan County, Kentucky, certain articles, to-wit: narcotics and other dangerous drugs such as marijuana, LSD, barbiturates or amphetamines. Affiant states that the said housetrailer or mobile home and premises are located as follows: A certain white housetrailer or mobile home, located or situated in what is known as Workman's Trailer Court,

in Clearfield, Kentucky, being the fifth housetrailer or mobile home below the Workman's Laundrymat and on the same side of the street in said mobile home park as said laundry, as you enter said park. Also this is the housetrailer with a large window running completely across the front or end of the trailer. The trailer park is located just to the right and across the creek from Kentucky Highway No. 519 as you travel north on said highway toward Clearfield downMorgansFork on said highway toward Clearfield down Morgans Fork.

Affiant further states that the information upon which he relies is as follows: That on 25th February 1970, at the hour of 12:25 A.M., local time, he drove to said above described housetrailer with Dave Roberts and Jerry Jones, after the said Dave Roberts informed affiant he could purchase LSD tablets or pills there, from a person identified as "Sonny" Harness. Dave Roberts alighted from affiants automobile, knocked on the housetrailer door and "Sonny" Harness came to the door, talked with Dave Roberts and admitted him to the trailer. In approximately two (2) minutes Dave Roberts and "Sonny" Harness reappeared at the door, Dave Roberts came back to the car and delivered two (2) pills or tablets of LSD to this affiant and told affiant he had purchased these pills from "Sonny" for Five ($5.00) Dollars, which affiant had previously given Roberts.

Further affiant states on the 27th February 1970, at 9:45 P.M., local time, he went to the above described trailer and purchased approximately ten (10) grams of hashish or marijuana from Edgar Eugene Harness for which affiant paid the said Harness the sum of $32.50, U. S. currency.

Affiant further states that dangerous drugs and narcotics are unlawfully possessed by the said Edgar Eugene Harness as he believes.

Affiant further states that the person described as "Sonny" Harness and Edgar Eugene Harness are the one and same person.

/s/ HERBERT BOWLING

Subscribed and sworn to before me by the above named affiant, this 27th day of February 1970.

/s/ OTTIS CALDWELL
Judge Rowan Quarterly Court

[T. E., Vol. 3, pp. 78, 79]

By MR. CREECH: I say you gave it back to him so you could buy some of it from him; that is true isn't it?

A. Yes sir.

Q. That's exactly true?

A. Right.

[T. E., Vol. 3, pp. 123, 124]

BY THE COURT: The question in my mind, gentlemen, is this. If the drugs that were brought back belonged to this man and he left them there himself why

then I entertain the idea that it was entrapment when he leaves them there and goes and gets the warrant to find them there. But if they were the defendant's drugs why I think the search is all right.

BY MR. CREECH: If it please, Your Honor, let me say this, if I may. This man has sworn an affidavit that he purchased the drugs from Larry Burger or Larry Knight.

BY THE COURT: Where does it say that?

BY MR. CREECH: Let me have the affidavit. Also this man admitted three times under oath that he gave these to Mr. Harness so that he could buy them back. And one of the cases we cited, Your Honor, is directly in point with that very happening or occurrence.

BY THE COURT: Is that the same marijuana that you brought back in the glove compartment?

BY THE WITNESS: Yes sir.

[T. E., Vol. 3, p. 131]

BY MR. CREECH: The defendant moves that the evidence with respect to LSD be suppressed and that the search warrant be quashed as to that upon the grounds that it is a part of the process of an unlawful entrapment and therefore is illegal; and the court advised overruled the motion.

E COPY

Supreme Court, U. S.
FILED
AUG 15 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 71-1485

EDGAR EUGENE HARNESS, JR. ----------PETITIONER

Vs.

COMMONWEALTH OF KENTUCKY ----------RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

ED W. HANCOCK
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TABLE OF CONTENTS AND AUTHORITIES

	Page
OPINION BELOW	1
JURISDICTION	1-4
QUESTIONS PRESENTED	4-5
STATEMENT OF THE CASE	5
ARGUMENT	5-14
I. THE AFFIDAVIT ON ITS FACE ESTABLISHED SUFFICIENT PROBABLE CAUSE TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT	5-9
II. WHERE ONE PORTION OF AN AFFIDAVIT IS SUFFICIENT TO SUPPORT PROBABLE CAUSE, A SUBSEQUENT DETERMINATION THAT ANOTHER PORTION OF THE AFFIDAVIT WAS BASED UPON "ENTRAPPED INFORMATION" WILL NOT DESTROY THE VALIDITY OF THE SEARCH WARRANT	10-11
III. THE COURT OF APPEALS OF KENTUCKY CORRECTLY DECIDED, *BASED ON KENTUCKY LAW*, THAT WHERE THE "AFFIDAVIT IS REGULAR IN FORM AND THE STATEMENTS CONTAINED THEREIN SUFFICIENTLY SHOW PROBABLE CAUSE, IT IS NOT PROPER TO GO BEHIND THE ALLEGATIONS OF THE AFFIDAVIT IN DETERMINING WHETHER THE ALLEGATIONS FURNISH SUFFICIENT PROBABLE CAUSE"	11-14
CONCLUSION	14
PROOF OF SERVICE	15

CITATIONS

Cases:

Aguilar v. Texas, 378 U.S. 108, 12 L.ed 2d 723, 84 S.Ct. 1509 (1964)	8, 9
Columbia Water Power Co. v. Columbia Electric R.L.&P. Co., 172 U.S. 475, 43 L.ed 521, 19 S.Ct. 247 (1898)	1

Page

Commonwealth v. Thacker,
229 Ky. 488, 17 S.W.2d 399 (1929) ---------- 3, 4, 12, 13

Draper v. United States, 358 U.S. 307, 313,
3 L.ed 2d 327, 332, 79 S.Ct. 329 (1959) ---------- 6

Dumbra v. United States, 268 U.S. 435, 441,
69 L.ed 1032, 1036, 45 S. Ct. 546 (1925) ---------- 6, 7

Jones v. United States, 362 U.S. 257,
4 L.ed 2d 697, 80 S. Ct. 725, 78 ALR2d 233 (1960) ---------- 7

Lynch v. New York ex rel. Pierson,
293 U.S. 52, 54, 79 L.ed 191, 55 S.Ct. 16 (1934) ---------- 3

McCreary v. Sigler, 406 F.2d 1264 (8th Cir., 1969),
cert. denied 395 U.S. 984, 23 L.ed2d 773,
89 S.Ct. 2149 (1969) ---------- 7, 8

Mattingly v. Commonwealth,
310 Ky. 561, 221 S.W.2d 82 (1949) ---------- 12, 13

Murdock v. Memphis,
20 Wall 590, 22 L.ed 429 (1875) ---------- 3

Nathanson v. United States, 290 U.S. 41, 46,
78 L.ed 159, 162, 54 S.Ct. 11 (1933) ---------- 5

New York ex rel. Bryant v. Zimmerman,
278 U.S. 63, 67, 68, 73 L.ed 184,
63 S.Ct. 84 (1928) ---------- 3

New York Central & Hudson River Railroad Co.
v. New York, 186 U.S. 269, 273,
46 L.ed 1158, 22 S.Ct. 916 (1901) ---------- 2

O'Brien v. O'Brien,
294 Ky. 793, 172 S.W.2d 595, 609 (1943) ---------- 3

Oxley Stave Co. v. Butler County,
166 U.S. 648, 655, 41 L.ed 1149,
17 S.Ct. 1003 (1896) ---------- 2

Spencer v. Texas, 385 U.S. 554, 564,
17 L.ed2d 606, 87 S.Ct. 648 (1967) ---------- 13

Spinelli v. United States, 393 U.S. 410,
21 L.ed2d 637, 89 S.Ct. 584 (1969) ---------- 8, 9, 14

United States v. Bozza,
365 F.2d 206, 225 (2d Cir., 1969) ---------- 8

Page

United States v. Harris,
403 U.S. 573, 577, 29 L.ed2d 723, 730,
91 S.Ct. 2075 (1971) ---------- 5, 6, 7, 8, 10, 13

United States v. Ventresca,
380 U.S. 102, 108, 109,
13 L.ed2d 684, 689,
85 S.Ct. 741 (1965) ---------- 5, 8, 10, 14

Constitution:
Fourteenth Amendment, U.S. Constitution ---------- 1, 3

Fourth Amendment, U.S. Constitution ---------- 3

Section Fourteen, Constitution of Kentucky ---------- 3

Section Ten, Constitution of Kentucky ---------- 3

Statutes:
28 U.S.C. § 1257(3) ---------- 1

Miscellaneous:
Rule 23-1(f), Rules of the Supreme Court ---------- 2

In The

Supreme Court of the United States

No. 71-1485

EDGAR EUGENE HARNESS, JR. ----------*Petitioner*

Vs.

COMMONWEALTH OF KENTUCKY ----------*Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below from the Kentucky Court of Appeals is styled *Edgar Eugene Harness, Jr. v. Commonwealth of Kentucky,* reported at 475 S.W.2d 485 (1972).

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of 28 U.S.C. § 1257(3), the proper provision for review of a state court judgment in a criminal case on certiorari.

The question the petitioner attempts to present here under the Fourteenth Amendment of the Constitution of the United States has never been properly presented to or decided by the courts of Kentucky so as to give this Court jurisdiction to review the judgment on writ of certiorari.

In *Columbia Water Power Co. v. Columbia Electric R.L.&P. Co.*, 172 U.S. 475, 43 L.ed 521, 19 S.Ct. 247 (1898), this Court in discussing jurisdictional requirements stated:

> "There is no doubt that under the third class the Federal right, title, privilege, or immunity *must be,* with possibly some rare exceptions, *specifically set up or claimed* to give this court jurisdiction." (Emphasis added.)

Rule 23-1(f) of the rules of this Court provides in part:

> *"If review of the judgment of a state court is sought,* the statement of the case shall also specify *the stage in the proceedings in the court of first instance and in the appellate court,* at which, and *the manner in which,* the federal questions sought to be reviewed were raised; *the method of raising them* (eg., by a pleading, by request to charge and exceptions, by assignment of error); *and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record,* or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portions of the court's charge and exception thereto, assignment of errors) *as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."* (Emphasis added.)

A review of the record of the state court proceedings in the instant case shows that petitioner did not specifically set up or raise a federal question with the required particularity so as to bring such question to the attention of the state courts. In *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655, 41 L.ed 1149, 17 S.Ct. 1003 (1896), this Court said:

> ". . . the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

In raising the federal question, it is necessary that the question be presented in the state courts in such a manner that there is no doubt that reliance is upon federal rights rather than state rights. See *New York Central & Hudson River Railroad Co. v. New York,* 186 U.S. 269, 273, 46 L.ed 1158, 22 S.Ct. 916 (1901).

Furthermore, this Court has stated that if it is uncertain whe-

ther a claim is grounded on some provision of the State Constitution or on some provision of the Federal Constitution, it will be assumed that reference is being made to the State rather than the Federal Constitution. See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 68, 73 L.ed 184, 63 S.Ct. 84 (1928).

The Fourth Amendment of the United States Constitution and Section Ten of the Constitution of Kentucky are of like import. In addition, due process under the law, vouched-safe to all citizens by the Fourteenth Amendment of the Federal Constitution, is similarly vouched-safe to the citizens of Kentucky by the Bill of Rights of the Constitution of Kentucky, Section 14. See *O'Brien v. O'Brien*, 294 Ky. 793, 172 S.W.2d 595, 609 (1943).

The fact that petitioner cited United States Supreme Court cases in his briefs to the state court is neither sufficient to raise a federal quesion nor sufficient to establish jurisdiction. Jurisdiction cannot be founded by surmise. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54, 79 L.ed 191, 55 S.Ct. 16 (1934).

This application for writ of certiorari should be denied, because petitioner failed to set out or raise a federal question with sufficient definiteness so as to bring such question to the attention of the state courts and because petitioner failed to state whether his claim was grounded upon provisions of the Constitution of Kentucky or the United States Constitution.

Even if petitioner could be said to have raised a federal question by intendment, it would be of no consequence in the present case. The decision of the state court was based upon a nonfederal ground, i.e., on state law; and this Court, in *Murdock v. Memphis*, 20 Wall. 590, 22 L.ed 429 (1875), stated that it would not review a state court judgment if there is an adequate and independent state ground which supports the decision of the state courts.

The decision of the Kentucky Court of Appeals was adequately supported by the Kentucky case of *Commonwealth v.*

Thacker, 229 Ky. 488, 17 S.W.2d 399 (1929), which held that it was not proper to go behind the allegations of the affidavit in determining whether the allegations furnish sufficient evidence of probable cause. The affidavit was sufficient on its face to establish probable cause to support the issuance of a search warrant.

Notwithstanding that petitioner had properly raised in the state courts the question he presents here, the Court should decline to review because the judgment of this case was reached upon a nonfederal ground which independently and adequately supports the decision reached by the state court. Thus, determination of the question that petitioner brings here was unnecessary by the state court in its decision of this case.

For the foregoing reasons, respondent submits that petitioner's application for certiorari should be denied because it fails to meet jurisdictional requirements.

QUESTIONS PRESENTED

I. WHETHER THE AFFIDAVIT ON ITS FACE ESTABLISHED SUFFICIENT PROBABLE CAUSE TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT.

II. WHERE ONE PORTION OF AN AFFIDAVIT IS SUFFICIENT TO SUPPORT PROBABLE CAUSE, WILL A SUBSEQUENT DETERMINATION THAT ANOTHER PORTION OF THE AFFIDAVIT WAS BASED UPON "ENTRAPPED INFORMATION" DESTROY THE VALIDITY OF THE SEARCH WARRANT?

III. WHETHER THE COURT OF APPEALS OF KENTUCKY CORRECTLY DECIDED, *BASED ON KENTUCKY LAW*, THAT WHERE THE "AFFI-

DAVIT IS REGULAR IN FORM AND THE STATEMENTS CONTAINED THEREIN SUFFICIENTLY SHOW PROBABLE CAUSE, IT IS NOT PROPER TO GO BEHIND THE ALLEGATIONS OF THE AFFIDAVIT IN DETERMINING WHETHER THE ALLEGATIONS FURNISH SUFFICIENT PROBABLE CAUSE."

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. Additional material facts and corrections will be set out in the respective arguments which follow.

ARGUMENT

I.

THE AFFIDAVIT ON ITS FACE ESTABLISHED SUFFICIENT PROBABLE CAUSE TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT.

Affidavits for search warrants must be tested and interpreted by magistrates and courts in a common sense and realistic fashion and reviewing courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense, manner. *United States v. Ventresca*, 380 U.S. 102, 108, 109, 13 L.ed2d 684, 689, 85 S.Ct. 741 (1965). See, also, *United States v. Harris*, 403 U.S. 573, 577, 29 L.ed2d 723, 730, 91 S.Ct. 2075 (1971).

Of course, it is necessary that the affidavit be more than conclusory and the Court has held a search warrant invalid where the supporting affidavit was a "mere affirmation of suspicion and belief." *Nathanson v. United States*, 290 U.S. 41, 46, 78 L.ed 159, 162, 54 S.Ct. 11 (1933). But where the affidavit contains the underlying circumstances and facts from which the

magistrate could find probable cause, then the validity of the search warrant should be upheld. See *Harris*, supra, at 578.

We submit that the affidavit at question in the instant case, on its face, presented the magistrate with sufficient underlying circumsances to support the issuance of a search warrant based upon probable cause.

As petitioner concedes at page six of his petition, the affidavit can be divided into two portions. The first portion relates to the LSD charge and is as follows:

> "Affiant further states that the information upon which he relies is as follows: That on 25th February 1970, at the hour of 12:25 A.M., local time, he drove to said above described housetrailer with Dave Roberts and Jerry Jones, after the said Dave Roberts informed affiant he could purchase LSD tablets or pills there, from a person identified as 'Sonny' Harness. Dave Roberts alighted from affiants automobile, knocked on the housetrailer door and 'Sonny' Harness came to the door, talked with Dave Roberts and admitted him to the trailer. In approximately two (2) minutes Dave Roberts and 'Sonny' Harness reappeared at the door, Dave Roberts came back to the car and delivered two (2) pills or tablets of LSD to this affiant and told affiant he had purchased these pills from 'Sonny' for Five ($5.00) Dollars, which affiant had previously given Roberts."

It is clear that this information alone would supply the probable cause necessary to issue a search warrant. Such information would warrant a man of reasonable caution to believe that LSD was in fact present at petitioner's trailer. This would, therefore, meet the test of "probable cause" laid down in *Draper v. United States*, 358 U.S. 307, 313, 3 L.ed2d 327, 332, 79 S.Ct. 329 (1959); and also the test stated in *Dumbra v. United States*, 268 U.S. 435, 441, 69 L.ed. 1032, 1036, 45 S.Ct. 546 (1925), where it was said:

> "In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question "whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant."

Petitioner, however, claims that this information is insufficient to support a search warrant because the affiant failed to allege facts showing the informant's reliability. This contention of petitioner is without merit. In *Jones v. United States*, 362 U.S. 257, 4 L.ed2d 697, 80 S.Ct. 725, 78 ALR2d 233 (1960), the rule was set forth that an affidavit which sets out personal observations relating to the existence of cause to search is not to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. "An affidavit is not to be deemed insufficient . . . so long as a *substantial basis* for crediting the hearsay is presented." (Emphasis added.) *Id.* at 707. This "substantial basis" test was reaffirmed in *United States v. Harris*, 403 U.S. 573, 29 L.ed2d 723, 91 S.Ct. 2075 (1971). In the instant case the affiant, Officer Bowling, did not relate in his affidavit observations that were solely those of another. Much of what he reported was his own personal obseravtions of what transpired. The fact that Officer Bowling gave Roberts $5.00, sent him to appellant's trailer to buy LSD and Roberts returned with two LSD tablets was within the personal knowledge of Officer Bowling. It would be difficult to provide a more "substantial basis" for crediting Roberts than these independent observations and they are a far stronger reason for believing Roberts than a mere statement of an informant's previous reliability.

In *McCreary v. Sigler*, 406 F.2d 1264 (8th Cir., 1969), *cert. denied* 395 U.S. 984, 23 L.ed 2d 773, 89 S.Ct. 2149 (1969), it was

stated that the reliability of an informant may be demonstrated to the magistrate in many collateral ways. *Id.* at 1268. For instance where, as in the instant case, the officer has not previously known the informant, it is not possible for him with certainty to vouch for the informant's reliability (TE 54, 73). It would, however, be ludicrous for the court to foreclose the use of such information in all such instances. Furthermore, to require a bare allegation of an informer's previous reliability in such a case would impose burdens on the police beyond their power to meet. See *United States v. Bozza,* 365 F.2d 206, 225 (2d Cir., 1969). The *McCreary* case, therefore, held that under such circumstances reliability can be best established "by the affiant relating some corroboration of the story which the informant tells." *Id.* at 1269. It is abundantly clear in the instant case that Officer Bowling's affidavit in support of the search warrant contained sufficient independent observations to provide even more than "some corroboration."

In addition, the instant case is similar to *United States v. Harris,* supra, where the affidavit related both the personal observations of the informant and of the affiant and the Court held that there was a substantial basis for crediting the hearsay. The Court in *Harris* also pointed out that when there is a substantial basis for crediting any hearsay involved then an averment of previous reliability is not necessary. *Id.* at 581, 582. We therefore submit that the independent observations of Officer Bowling were sufficient corroboration in themselves of what transpired between Roberts and petitioner, and that the combined observations of Officer Bowling and Roberts provided a substantial basis for crediting the hearsay involved. Therefore, the magistrate was justified upon the basis of this information alone to issue the search warrant.

Petitioner contends that under the decisions of *United States v. Ventresca,* supra; *Spinelli v. United States,* 393 U.S. 410, 21 L.ed2d 637, 89 S.Ct. 584 (1969); and *Aguilar v. Texas,* 378 U.S. 108, 12 L.ed2d 723, 84 S. Ct. 1509 (1964), Roberts' reliability was not shown. This contention is without merit. Even when

viewed in light of these cases, it is clear that the first portion of the affidavit in the instant case is sufficient. It was pointed out in *Spinelli* that the magistrate must assure himself that he is relying on something in the affidavit "more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Id.* at 418. Obviously the information provided in the affidavit in the case at hand assured the magistrate his reliance was upon much sounder grounds than this.

We therefore finally submit that even when measured against the two-pronged test of *Aguilar* sufficient probable cause was shown upon the face of the affidavit to justify the issuance of a search warrant. The affidavit clearly sets forth the underlying circumstances to support the allegations of the affiant and reveals enough independent observations to establish the reliability of the informant.

The second portion of the affidavit relates to the alleged sale of marijuana which the trial court felt might have been the result of entrapment and for that reason dismissed the indictment as to the marijuana and suppressed the use of such evidence in the trial of petitioner on the LSD charge. The second portion of the affidavit is as follows:

> "Further affiant states on the 27th February 1970, at 9:45 P.M., local time, he went to the above described trailer and purchased approximately ten (10) grams of hashish or marijuana from Edgar Eugene Harrness for which affiant paid the said Harness the sum of $32.50, U.S. currency."

As to this portion of the affidavit, it is clear that on its face it established probable cause for the issuance of the search warrant by the magistrate. We therefore submit that the affidavit as a whole and each portion of it, in and of itself, was sufficient in the instant case to support the issuance of the search warrant based upon probable cause.

II.

WHERE ONE PORTION OF AN AFFIDAVIT IS SUFFICIENT TO SUPPORT PROBABLE CAUSE, A SUBSEQUENT DETERMINATION THAT ANOTHER PORTION OF THE AFFIDAVIT WAS BASED UPON "ENTRAPPED INFORMATION" WILL NOT DESTROY THE VALIDITY OF THE SEARCH WARRANT.

Petitioner argues that the portion of the affidavit dealing with marijuana is defective because it was based on "entrapped information"; and that, therefore, *ipso facto*, the entire affidavit must be thrown out. This argument is a non sequitur and demonstrably false.

Logically and practically, this affidavit falls into two portions: that portion dealing with marijuana and that portion dealing with LSD. Even if the petitioner is correct in his argument that the information on marijuana must be excluded because of the means by which it was obtained, the information regarding petitioner's possession of LSD can stand on its own and still constitute probable cause. (See respondent's brief, Argument I.) The information on LSD was sufficient to support the issuance of a separate search warrant; however, in the interest of efficiency, one search warrant was issued to covered both the LSD and the marijuana.

Today there is no justification for construing an affidavit or search warrant as if it were a common law writ. *United States v. Harris*, 403 U.S. 573, 579, 29 L.ed2d 723, 731, 91 S.Ct. 2075 (1971). This Court has made it clear that affidavits for search warrants must be considered realistically. In *United States v. Ventresca*, 380 U.S. 102, 13 L.ed2d 684 at 689, 85 S.Ct. 741 (1965), this Court said:

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional

requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward wararnts will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

We believe this statement reflects the proper approach to the issue raised herein. The information on the LSD raises independent grounds upon which a search warrant could have been issued. The fact that this information was consolidated in an affidavit with other evidence later adjudged to have been obtained by entrapment should not vitiate the search warrant as it applied to the LSD.

Thus, it is unnecessary for this Court to consider the question of whether "entrapped evidence" can be used in an affidavit to establish probable cause, because determination of this question is neither material nor decisive in the case at bar.

III.

THE COURT OF APPEALS OF KENTUCKY CORRECTLY DECIDED, *BASED ON KENTUCKY LAW*, THAT WHERE THE "AFFIDAVIT IS REGULAR IN FORM AND THE STATEMENTS CONTAINED THEREIN SUFFICIENTLY SHOW PROBABLE CAUSE, IT IS NOT PROPER TO GO BEHIND THE ALLEGATIONS OF THE AFFIDAVIT IN DETERMINING WHETHER THE ALLEGATIONS FURNISH SUFFICIENT PROBABLE CAUSE."

Petitioner asserts that the Kentucky Court of Appeals decided in this case that illegally obtained information could be used in an affidavit to support the issuance of a search warrant. This is an incorrect assertion.

In its decision the Kentucky court stated that the affidavit was sufficient on its face and, *under Kentucky law,* it is improper to go behind the allegations of the affidavit to determine whether they furnish probable cause. See *Mattingly v. Commonwealth,* 310 Ky. 561, 221 S.W.2d 82 (1949); *Commonwealth v. Thacker,* 229 Ky. 488, 17 S.W.2d 399 (1929).

There were two separate portions of information set out on the face of the affidavit from which the Kentucky court had to look to determine if probable cause had been established; that portion relating to the marijuana and that portion relating to the LSD.

On its face, the information furnished in the marijuana portion was clearly sufficient to establish probable cause to support the magistrate's issuance of the search warrant. Having determined that this portion, in and of itself, was sufficient to establish probable cause, the Kentucky court considered it unnecessary to determine the sufficiency of the portion of the affidavit dealing with the LSD.

The basis of the Kentucky court's decision was that the affidavit was sufficient on its face to establish probable cause and *under Kentucky law* it was improper to go behind the affidavit to determine the sufficiency, not that illegally obtained information could support the issuance of a search warrant as petitioner asserts.

After making the above assertion, petitioner further contends, on page 5 of his petition, that the "broad and general form of the narrow issue presented here is whether or not the integrity of an affidavit may be attacked."

Persuasive argument can be made on both sides of this

question. The Kentucky Courts have decided this question by stating that where an affidavit is regular in form and sufficient on its face to establish probable cause it is improper to go behind the allegations of the affidavit to determine whether the allegations furnish sufficient evidence of probable cause. *Mattingly; Thacker,* supra.

In *Spencer v. Texas,* 385 U.S. 554, 564, 17 L.ed. 2d 606, 87 S.Ct. 648 (1967), this Court stated:

> "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial . . . But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority . . . As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.' Snyder v. Massachusetts, 291 US 97, 105, 78 L.ed 674, 677, 54 S.C.t 330, 90 ALR 575. See also Buchalter v. New York, 319 US 427, 87 L.ed 1492, 63 S. Ct. 1129."

We submit that the rule in Kentucky which prohibits a court from looking behind an affidavit is judicially sound, both as to law and policy.

It must be remembered, as the petitioner points out, that the procedure by which a search warrant is obtained is, pursuant to Kentucky and federal law, an ex parte proceeding.

The magistrate has but one function, to wit: the determination of whether (vel non) probable cause exists. The issue in such proceedings is not guilt beyond a reasonable doubt. *United States v. Harris,* 403 U.S. 573, 29 L.ed2d 723, 91 S.Ct. 2075 (1971).

Moreover, it is germane to the issues herein raised that affidavits of probable cause to support the issuance of a search

warrant are tested by much less rigorous standards than those governing the admissibility of evidence at the trial level. In *United States v. Ventresca*, 380 U.S. 102, 13 L.ed2d 684, 85 S.Ct. 741 (1965), this Court stated at page 107:

> "While a warrant may issue only upon a finding of 'probable cause,' this Court has long held that 'the term "probable cause" . . . means less than evidence which would justify condemnation,' Locke v. United States, 7 Cranch 339, 348, 3 L.ed 364, 367, and that a finding of 'probable cause' may rest upon evidence which is not legally competent in a criminal trial. Draper v. United States, 358 U.S. 307, 311, 3 L.ed2d 327, 331, 79 S.Ct. 329."

This Court has consistently upheld the idea that magistrates in search wararnt proceedings are not to be limited by excessive restrictions. Rather, they are to use common sense. *Spinelli v. United States*, 393 U.S. 410, 21 L.ed2d 637, 89 S.Ct. 584 (1969).

CONCLUSION

The petitioner has failed to properly meet the jurisdictional requirements or to present a substantial federal question necessary for the consideration of this Court. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,
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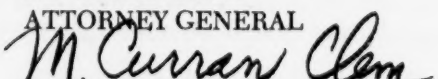
ATTORNEY GENERAL



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PROOF OF SERVICE

I, M. Curran Clem, one of counsel for respondent, hereby certify that the foregoing Brief was served on petitioner by depositing three copies of same in the United States mail, first class postage prepaid, on July 12, 1972, addressed to counsel for petitioner, Honorable C. B. Creech, Honorable Astor Hogg, and Honorable Michael D. Johnson, 1107 2nd National Bank Building, Ashland, Kentucky 41101.

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